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BACKGROUND INFORMATION FOR NONCONFORMING USE AND NONCONFORMING STRUCTURE DISCUSSION

Comprehensive zoning ordinances have been used by counties, cities and villages across the United States for regulating land use for nearly 80 years. Early zoning ordinances almost always included a provision that allowed the continued use of existing structures with uses that were no longer permitted, or that did not otherwise meet the new zoning standards, but only for a period of time. It was recognized that if the purposes of the zoning ordinances were going to be achieved, compliance with the requirements of the ordinances would have to be required for all properties at some point in the future.

Sometimes those early zoning ordinances established a specific time period at the end of which nonconforming structures would have to be brought into compliance with the ordinance. However, more often than not, zoning ordinances were drafted to simply limit the expansion, structural repair and reconstruction of nonconforming structures. It was thought that near the end of the useful life of a building, the owner would decide to replace the nonconforming building with a conforming building instead of continuing to try to maintain a deteriorating structure. It was assumed that waiting until expansion or substantial reconstruction of the building was needed would mean that the owner had enjoyed reasonable use of the nonconforming building over the years, and that the property owner would incur the least cost to bring the property into compliance with the zoning ordinance at that time.

LEGISLATIVE BACKGROUND

When the Wisconsin Legislature authorized the adoption of zoning ordinances by cities (in what is now s. 62.23 (7)(h), Wis. Stats.), the legislators included a specific provision in the statute that prohibits cities (and now villages and towns exercising village powers) from allowing structural repairs or structural alterations to buildings with nonconforming uses that exceed 50% of the assessed value of the nonconforming building, unless it is permanently changed to a conforming use. In what is now s. 59.69 (10), Wis. Stats., the State Legislature enacted a similar provision and allowed counties the option of using a "50% rule" to regulate additions, alterations and repairs to structures with nonconforming uses, but didn't require the use of the 50% rule. NR 115, the shoreland management regulations, provide that option to counties. NR 116, since it regulates floodplain development in all communities, requires counties, as well as cities and villages, to use the 50% rule. At least in the past, most zoning ordinances, and the Wisconsin court decisions interpreting them, did not distinguish between buildings with nonconforming uses and buildings with conforming uses that did not conform to dimensional zoning standards. They were all considered to be nonconforming structures, and were regulated in the same way.

In 1966, the Wisconsin Legislature created the shoreland zoning statute that is now numbered s. 59.692, Wis. Stats. The Legislature could have decided to use some other mechanism to protect the public interest in navigable waters and the shoreland area (such as requiring permits issued by the Department of Natural Resources for development in the shoreland area similar to the permits required under ch. 30, Wis. Stats.). However, when the Legislature chose to create a zoning program to be administered by counties with DNR oversight, it meant that the constitutional law, statutes and case law that applied to comprehensive zoning ordinances became applicable to shoreland regulations as well.

CONSTITUTIONAL ISSUES

The U.S. Constitution and the Wisconsin Constitution both require equal protection of the law, and state and federal courts have interpreted these constitutional guarantees to require that zoning restrictions must be uniform for properties in the same district that are similarly situated, unless there is a reasonable basis for different treatment. In *Katt v. Village of Sturtevant*, 269 Wis. 638, 70 N.W. 2d 188 (1955), the Wisconsin Supreme Court held that a village ordinance making it unlawful to maintain mink or other fur farms within the village, but also providing that the ordinance does not affect any such business established and operating prior to its passage, was discriminatory. The Supreme Court stated: “Ordinances that are discriminatory are held to be void within the prohibition of the equal-protection provisions of the federal and state constitutions.” 269 Wis. 638 at 641. See also *Boerschinger v. Elkay Enterprises, Inc.*, 32 Wis.2d 168, 145 N.W. 2d 108 (1966). A zoning ordinance that attempts to create requirements that are applicable to new construction but will never apply to existing structures would be unconstitutional. In the long run, all property owners must be treated equally.

However, the courts in Wisconsin, and in other states, have held that it is reasonable for a property owner with an existing nonconforming structure to be allowed to continue to use the structure for a reasonable period of time after the ordinance or ordinance amendment that makes it nonconforming takes effect, after which the property is to be brought into compliance with the zoning ordinance. If there are no limitations placed on the expansion, improvement or structural repair of nonconforming structures, the owners of the properties with nonconforming structures would enjoy different treatment under the zoning ordinance than the owners of properties who proposed to build new structures. The zoning restrictions would not be uniformly applied to all properties.

While Wisconsin courts have protected the rights of property owners to continue a nonconforming use or nonconforming structure for a reasonable period of time after new zoning ordinance provisions take effect, the courts have clearly held that the owner of structure or property with a nonconforming use does not have the right to extend or change the nonconforming use (except to bring the property into compliance with current standards). Nonconforming structure provisions are intended to protect only the use and the structure that existed at the time the regulations took effect, while placing clear limits on the expansion, alteration and structural repair of such uses and structures to ensure that eventual compliance with the ordinance is achieved. This is why such concepts as restrictions on changes in use, discontinuation of the use, destruction or abandonment, amortization of nonconforming structures and the “50% rule” have been introduced over the years.

PROBLEMS WITH THE 50% RULE

But the goal of bringing these "nonconformities" into compliance has been elusive. There are a number of problems with enforcing the "50% rule" and similar restrictions based on the value of the nonconforming structure:

- ✓ Inequitable assessments both within and between communities.
- ✓ Inequitable cost of allowed alterations – the owners of more expensive structures can do more extensive alterations - makes no sense in light of the underlying purposes of nonconforming regulations.
- ✓ Boards of Review may grant assessment increases just to facilitate remodeling work - another equity issue.
- ✓ Unwillingness or inability of zoning officials to track costs of structural work done on properties.
- ✓ Very difficult to determine "true" costs of structural work in many cases - labor costs, invoices for building materials, structural vs. nonstructural costs, use of cost manuals vs. "actual" contractors costs.
- ✓ Encourages property owners and contractors to "cheat" on cost estimates.
- ✓ A confusing, controversial and low-priority issue for many zoning officials.
- ✓ Trying to use the "50% rule" has hurt enforcement efforts and credibility in many communities, and has done a poor job of achieving the public policy objectives that shoreland and floodplain zoning ordinances were enacted to achieve.

However, because of s. 62.23 (7)(h), Wis. Stats., a statutory change will be necessary before the Department of Natural Resources can eliminate the "50% rule" from ch. NR 116, Wis. Adm. Code, entirely. Section 62.23 (7)(h), Wis. Stats., prohibits cities and villages from allowing structural repairs or structural alterations to buildings with nonconforming uses if the cost of the structural repairs or structural alterations will exceed 50% of the assessed value of the building with the non-conforming use.

Another issue is federal regulations. In the floodplain management program, routine structural repairs, alterations and additions can be regulated through a square footage cap or other measures, but the "50%" rule must be retained for addressing floodplain structures that are damaged by a flood event. In this case, the state must abide by minimum Federal Emergency Management Regulations, which require the use of the 50% approach for determining whether a structure has been "substantially damaged" (greater than 50% of assessed value) due to a flooding event. These provisions only apply to flood events, since a recent statutory change allows floodplain structures which are substantially damaged by a "nonflood disaster" (s. 87.30 (1)(d)) to be rebuilt to the size and use they had before the disaster if minimum federal regulations can be met.